STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 312505 Wayne Circuit Court
SHAUN LAMAR HARRIS, Defendant-Appellant.	LC No. 12-002162-FH

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of breaking and entering a building with intent to commit larceny. MCL 750.110. He was sentenced as a fourth habitual offender, MCL 769.12, to 20 months to 10 years' imprisonment. We affirm.

I. Judicial Bias

Defendant first argues that the trial court prejudged his guilt and demonstrated an impermissible bias against him in violation of his Fifth and Fourteenth amendment rights to due process and his Sixth amendment right to a fair trial. Defendant did not raise an objection in the trial court based on judicial bias. Therefore, this issue has not been preserved for our review, *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2010), and we review it only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). "[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009).

Defendant asserts that the trial court demonstrated bias against him when the court remarked on his guilt and stated on the record that it was trying to send him to prison. Taken in context, these remarks do not indicate any bias against defendant. In fact, a complete review of the record indicates that the trial court demonstrated great patience with defendant and answered all of the questions that defendant posed to the court.

Defendant claims that the trial court indicated in the following exchange that defendant was guilty before it conducted his bench trial:

Q. (by the court) Do you still wish to go forward representing yourself?

A. (by defendant) Yes, sir, because it's better. [Defense counsel] keeps saying I'm guilty, and I'm telling him I'm not guilty.

Q. Do you understand, Mr. Harris, that one of the reasons why he's saying you're guilty is because you admitted doing what they're accusing you of doing on that tape.

A. I didn't break into the building.

Q. Except, here's the problem, Mr. Harris. When you were interviewed by the officer, you told him that you did.

A. Yeah.

This excerpt demonstrates that the trial court did not state that it believed defendant to be guilty; rather, the trial court was merely attempting to explain to defendant why his defense counsel may have recommended that defendant plead guilty.

Defendant also has taken out of context the trial court's statement regarding sending defendant to prison:

Q. (*by defendant*) And you said you're not going to come back down on the whatcha call it? Listen, you know that there's drugs in my history, why can't I get in treatment? Why can't I get treatment? That's what I need. I don't need prison. You're trying to send me to prison.

A. (*by the court*) I know I'm trying to send you to prison. Here's the reason why. You see all these priors, this is a whole list of your priors.

The trial court's remark regarding prison was in answer to defendant's question about why the trial court would not sentence defendant to a year in jail instead of one to five years in prison pursuant to a *Cobbs*[1] plea. The trial court's remark does not demonstrate bias because, upon a defendant's request, a court may state on the record the length of the sentence that, on the basis of the information available to the judge (such as defendant's prior record here), appears to be appropriate for the charged offense. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

Additionally, defendant argues that the trial court's bias against him was so evident under the circumstances prior to trial, including the fact that the trial court had already reviewed his criminal record and the tape of his interview with police, such that the trial court should have sua sponte recused himself from presiding over his case. We disagree. In *People v Cocuzza*, 413 Mich 78, 83-84; 318 NW2d 465 (1982), the defendant entered a plea, which was subsequently withdrawn, during which the trial judge heard the factual basis of the charge for which the

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

defendant was ultimately convicted. After withdrawing his plea, the defendant waived his right to a jury trial and stipulated to the trial court as the trier of fact. Under those circumstances, our Supreme Court held there was no obligation of the trial court to sua sponte recuse itself on the basis of bias. *Id.* at 83. The Supreme Court further held: "We will not reward the failure to move for disqualification, with assertion of the basis reserved for appellate purposes, by sanctioning a reversal of the defendant's conviction." The record here does not support defendant's assertion that the trial court's knowledge, gained through conducting the *Cobbs* plea discussions, biased the trial court against defendant. Defendant, with extensive knowledge of the criminal justice system, and after the comments made by the trial court he now challenges, opted without objection for a bench trial before that very judge. Consistent with *Cocuzza*, to allow defendant to proceed on this allegation of error would contravene the longstanding rule against a party harboring error as an appellate parachute. *People v Pipes*, 475 Mich 267, 278 n 39; 715 NW2d 290 (2006).

II. Sentence

Defendant next argues that, rather than making an individualized analysis of his culpability, the severity of the offense, and his criminal history, the trial court improperly sentenced him pursuant to a blanket policy of the trial court. We disagree. This Court reviews a trial court's sentencing decision for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

The trial court engaged in the following discussion with defendant regarding possible sentences should defendant decide to plead guilty pursuant to the *Cobbs* evaluation:

> *DEFENDANT*. I'm saying, I'm not going to take it to trial, you know what I'm saying? I know we went through everything that we went through. May I ask you?
>
> *THE COURT*. Sure.
>
> *DEFENDANT*. What's the difference between the year and the year here. I still got to deal with the parole. I still got to deal with it.
>
> *THE COURT*. I know. I know.
>
> *DEFENDANT*. I'm willing to take that and a year. Give me a year and treatment.
>
> *THE COURT*. Here's the difference; Mr. Harris. You're really caught up in a policy decision that we've made here. And I explained this to your lawyer and I'll explain it to you.
>
> When you got offered the local time at your arraignment on the information, it was done with the understanding that if you rejected that, that the offer that you would receive at the next level, which was this trial court here, it wouldn't be as good. And it's not as good.

DEFENDANT. But they didn't say that then.

THE COURT. So for me to take that policy that we've made and throw it out the window, it would mean that we mine [sic] as well not have the policy at all to begin with. So, why have a policy if we're not going to follow it. And that policy is designed so that if you're guilty — and look, I'm not saying you are or you're not; that's for a jury to decide. But, if you're guilty, we want to encourage you, so that we don't waste the Court's resources and time, that you take the plea when you show up here on the arraignment on the information. And if you reject it, the idea is you're doing so at your own risk. And that's the risk that you've accepted when you come to this courtroom. And that's why I'm saying your Cobbs is one to five. Do you understand?

DEFENDANT. All right.

THE COURT. So, how do you wish to proceed, at this time?

DEFENDANT. I'll plead guilty.

Defendant has confused this *Cobbs* evaluation discussion with the trial court's actual sentence. After an evidentiary hearing, defendant requested the offer of one year in jail that the prosecution had made at his arraignment. The trial court explained that it had no control over that offer because the offer came from the prosecution and was only available at the arraignment. On the morning of trial, defendant again tried to convince the trial court to sentence him to one year in jail, consistent with the prosecutor's offer. The trial court then explained to defendant that the prosecutor's offer was no longer available and would no longer be accepted by the court, due to court policy based on judicial economy, that the trial court would not accept a defendant's *Cobbs* plea that was identical to a plea offer already rejected by the defendant at the time of arraignment. Because defendant did not accept the *Cobbs* evaluation and proceeded to trial, the sentence ultimately imposed by the trial court after defendant's conviction had nothing to do with this court policy. Instead, defendant was sentenced within the range of the applicable sentencing guidelines. The trial court did not mention the court's *Cobb's* plea policy at that time, but focused on the fact that defendant could not seem to break his pattern of abusing drugs, committing crimes, serving time, and then returning to drugs. The trial court considered defendant's prospect for rehabilitation, punishment, and safety for the community, noted defendant's status as an habitual offender, and sentenced defendant to 20 months to 10 years in prison—well within the 10 to 46-month guidelines range. Because the record demonstrates the trial court conducted an individualized evaluation of the factors relevant to defendant's sentence, defendant cannot demonstrate the trial court abused its discretion.

III. Ineffective Assistance of Counsel

Finally, defendant argues that he was deprived of his Sixth Amendment constitutional right to effective assistance of counsel. Since defendant failed to raise the issue of ineffective assistance of counsel in the trial court, our review is limited to errors apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). To establish that he received ineffective assistance of counsel, defendant must show that: (1) his counsel's performance fell

below an objective standard of reasonableness under prevailing professional norms; (2) but for counsel's errors, there is a reasonable probability that the outcome would have been different; and (3) the proceedings were fundamentally unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

Defendant claims that defense counsel conceded defendant's guilt to the trier of fact. But defendant's claim is inconsistent with the record. As explained in Part I of this opinion, on the morning of his scheduled jury trial, defendant requested a new attorney or to represent himself. After the trial court discussed this request with defendant on the record, the trial court asked defendant if he still wanted to represent himself. Defendant said, "Yes, sir, because it's better. [Defense counsel] keeps saying I'm guilty, and I'm telling him I'm not guilty." Defense counsel had an obligation to give defendant his opinion on the weight of the evidence and advise defendant whether a plea would be advantageous. See *Lafler v Cooper*, ___ US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012). Defendant, not defense counsel, made defense counsel's opinion public. Therefore, defendant cannot establish that defense counsel's performance fell below an objective standard of reasonableness.

Defendant further argues defense counsel should have raised the issues of judicial bias and improper sentencing that defendant now argues on appeal. However, as we have already determined, those claims lack merit and counsel was not ineffective for failing to make futile objections to them. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). The record fails to establish that defense counsel's representation was ineffective.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter